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JUDICIAL WIT AND WISDOM. — In a recent case in Georgia, *Gilbert* v. *State*, 16 S. E. Rep. 652, where the question was whether the evidence sufficiently established the intent to murder required by the statute to merit the penalty proposed, the brief of the defendant's council, Mr. Leonidas McLester, opened thus: "When the mother of Achilles plunged him in the Stygian waters, his body became invulnerable, except the heel, by which she held him; and afterwards, when he and Ployxena, the daughter of the king of Troy, who were lovers, met in the temple of Apollo to solemnize their marriage, Paris, the brother of Hector, lurking behind the image of Apollo, slew Achilles by shooting him in the heel with an arrow." The court, speaking through Bleckley, C. J., after quoting this eloquent introduction, adds: "The brief of the Attorney-General is less poetic, but equally irrelevant. It cites seven cases from the Georgia Reports, not one of which has any bearing on the question; for in each of the cited cases the attempt to kill was successful. When a homicide actually occurs from the voluntary use of a deadly weapon, an intention to kill is very much more certain than it is when the man assaulted is not killed, but only shot in the toe." In the hurry and bustle to which the press of modern business too often condemns our courts, it is gratifying to observe that in one State at least the pleasant wit and elegant scholarship which have so long distinguished its bar and bench live on untouched by time.

COMMENT BY COUNSEL. — A very neat point is raised in the case of *Graves* v. *United States* (37 Central Law Journal, No. 23, 14 Sup. Ct. Rep. 40). The facts of the case are as follows: The plaintiff in error was tried for a murder alleged to have been committed in Indian Territory, and convicted, mainly upon circumstantial evidence. The prosecution proved by witnesses that when the deceased was last seen alive he was in the company of the prisoner and an unknown woman. The

prisoner set up an *alibi* as a defence. During the trial it was admitted that the prisoner's wife was in the same town, and that nevertheless she had not once been present in court. She was seen outside of the court-room by one of the witnesses of the prosecution, who testified that he believed her to be the woman who was supposed to have been with the defendant at the time of the murder. The district attorney, in his argument to the jury, was allowed, against the objections of the defendant, to comment unfavorably upon the absence of the defendant's wife from court, and to pronounce it a suspicious circumstance that she had not been present, in order that the witnesses for the government might have had an opportunity to identify her. The action of the court in permitting these comments to be made was the ground for the assignment of error.

The Supreme Court, in a majority opinion which was delivered by Mr. Justice Brown, reversed the judgment of the lower court, and remanded the case, with instructions to set aside the verdict and grant a new trial. The reasoning of the court seems to be that since the defendant's wife was incompetent to testify as a witness either for or against her husband, and since he was under no obligation to cause her appearance in court, it would be unjust to allow the jury to be told that her absence was a circumstance against him. The court approve of the rule that in criminal cases, if a party has it peculiarly within his power to produce witnesses whose testimony would clear up the case, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. But they distinguish the case under consideration on the ground that the wife was incompetent as a witness. The defendant could not have called his wife to the stand in order to let her throw light on the case by her testimony, and he was under no obligation to produce her for the purpose of giving the witnesses for the government a chance to identify her. Therefore the defendant was entitled not to have any attempt made to prejudice the jury against him by comment upon his omission to do what he was in no way bound to do.

It would seem clear, then, that the reasoning of the court is based upon the fact that the wife was incompetent as a witness. The case which apparently is relied upon as authority for the conclusion at which the court arrives is *Wilson* v. *United States*, 149 U. S. 60. That is a case which arose under a statute providing that a person charged with the commission of crime might, at his own request, be a competent witness on the trial, but that his failure to make such request should not create any presumption against him. The district attorney in his argument to the jury had commented unfavorably upon the fact that the defendant did not offer himself as a witness; and the court held that such comment was not permissible. The ground of the decision would appear to be that the liberty of the defendant to testify was a privilege, and that if unfavorable comment upon his omission to take advantage of the liberty were permitted, the benefit of the privilege would really be destroyed. But in the principal case there is no question of privilege. The defendant was not at liberty to call his wife to the stand if he desired, since she was absolutely incompetent to appear as a witness in the cause. Under these circumstances it rather puzzles one to understand how any argument derived from cases of privilege is applicable.

An extremely interesting dissenting opinion was delivered by Mr. Justice Brewer, in which he arrives at the conclusion that the failure of the defendant, under the circumstances, to bring his wife into court was

a legitimate subject for comment in argument. He lays down the rule that in the absence of express prohibition every fact which comes to the jury during the progress of the trial in a legal manner, and which might influence their minds, is a subject of comment by counsel in their arguments. As to the argument that the defendant's wife was not a competent witness, and that by this circumstance the case is distinguishable from cases where a party omitted to produce some witness whose testimony might have been enlightening, Mr. Justice Brewer says that while it is true that the wife could not have been called upon to give testimony, yet, on the other hand, she herself was testimony, and material testimony. He suggests that her non-appearance in court was suspicious, just as it would be a suspicious circumstance if it were proved that at the time of the murder the defendant had been in possession of a knife of a particular make, marked in a certain way, and that on the very morning of the trial a knife of the same make had been seen in the possession of the defendant, but that nevertheless the defendant had not produced the knife. The omission to produce the knife would be a significant fact, and one upon which the prosecuting attorney would be at liberty to comment. In the same way, the fact that the defendant's wife remained away from court, although it had been proved that she was near at hand where it would have been the easiest thing in the world for her to come, was a fact which would naturally affect the judgment of men, and in respect to which the district attorney was at liberty to comment.

It may be admitted that the point is a close one, and that the argument on each side is pretty strong. Perhaps the acknowledged tendency of the law to make presumptions in favor of the innocence of the accused in a criminal trial ought to turn the scale. The case where a party has it peculiarly within his own power to produce a witness whose testimony might elucidate the matter in issue is really not analogous. In such a case it is always conceivable that the witness might have proved the defendant's innocence. Therefore, since it might have been so much for his interest to produce the witness, the omission to do so raises a very strong presumption that the testimony would have been unfavorable to him. But in this case the presence of the wife in court could not have helped the defendant, while, on the contrary, it might have injured him seriously. If the witnesses for the government had failed to identify the prisoner's wife, there would be still nothing to show that some other woman was not with him at the time of the murder. On the other hand, if the woman had been identified, the identification would have furnished very convincing proof of the prisoner's guilt. The prisoner had everything to lose and nothing to gain by causing his wife to appear in court. It would hardly seem fair, then, to permit the prosecuting attorney to try to influence the minds of the jury by comment upon the defendant's omission to do what he was under no obligation to do, and which, had he done it, might have worked him very great harm, without any chance of its benefiting him at all. Upon this ground the opinion of the majority of the court would appear to be right.

NATURE OF A LANDOWNER'S RIGHT TO NATURAL GAS. — *Hague* v. *Wheeler*, 27 Atl. Rep. 714, was a bill by the owners of two plots of land overlying gas-bearing strata to enjoin the defendants, owners of a third adjacent piece of land, from allowing a gas well upon their premises to go